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Twin City Fire Insurance Company

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII**

UNIFIED WESTERN GROCERS,  
INC.; CERTIFIED GROCERS OF  
CALIFORNIA, LTD.; GROCERS  
SPECIALTY COMPANY; ALFRED  
A. PLAMANN; CHARLES PILLITER;  
DANIEL T. BANE; ROBERT M.  
LING; AND DAVID A. WOODWARD  
Plaintiffs,

Case No. CV 03 00336 HG BMK

**AMENDED ANSWER OF  
DEFENDANT TWIN CITY FIRE  
INSURANCE COMPANY TO  
PLAINTIFFS' COMPLAINT FOR  
DECLARATORY RELIEF;  
CERTIFICATE OF SERVICE**

**EXHIBIT A**

**EXHIBIT** A

**TWIN CITY FIRE INSURANCE COMPANY'S AMENDED ANSWER**

v.  
TWIN CITY FIRE INSURANCE  
COMPANY, an Indiana Corporation,  
Defendant.

ANSWER OF DEFENDANT TWIN CITY FIRE INSURANCE COMPANY  
TO PLAINTIFFS' COMPLAINT FOR DECLARATORY RELIEF

Defendant, Twin City Fire Insurance Company ("Twin City"), hereby amends its Answer to the Complaint for Declaratory Relief ("Complaint") of plaintiffs Unified Western Grocers, Inc. ("Unified Western Grocers"), Certified Grocers of California, Ltd. ("Certified Grocers"), Grocers Specialty Company ("Grocers Specialty"), Alfred A. Plamann ("Plamann"), Charles Pilliter ("Pilliter"), Daniel T. Bane ("Bane"), Robert M. Ling ("Ling") and David A. Woodward ("Woodward") (collectively, "Plaintiffs"), in this action, as follows:

JURISDICTION

1. Answering paragraphs 1 through 8 of the Complaint, Twin City is without knowledge or information sufficient to form a belief as to the truth of the averments set forth in paragraphs 1 through 8 therein, and on that basis denies each and every allegation contained therein.

2. Answering paragraph 9 of the Complaint, Twin City admits that it is a corporation organized and existing under the laws of Indiana. Except as expressly admitted, Twin City denies generally and specifically each and every allegation of paragraph 9.

3. Answering paragraph 10 of the Complaint, Twin City admits that the matter in controversy presented by this action exceeds the sum of \$75,000.

4. Answering paragraph 11 of the Complaint, Twin City admits that this Court has original diversity subject matter jurisdiction under the provisions

of 28 U.S.C. § 1332(a)(1) because the matter in controversy by this action exceeds the sum of \$75,000.

### VENUE

5. Answering paragraph 12 of the Complaint, Twin City admits that Plaintiffs so contend, without admitting the truth of any of Plaintiffs' allegations. Except as expressly admitted, Twin City denies generally and specifically each and every allegation set forth in paragraph 12 of the Complaint.

6. Answering paragraph 13 of the Complaint, Twin City admits that certain events or omissions giving rise to the claim occurred in the District of Hawaii. Except as expressly admitted, Twin City denies generally and specifically each and every allegation set forth in paragraph 13 of the Complaint.

7. Answering paragraphs 14 through 17 of the Complaint, Twin City admits that on or about February 1, 2001, it issued Directors and Officers and Company Liability Policy No. NDA0105226-01 to the directors and officers of United Western Grocers ("the Policy"). Twin City further alleges that the terms of the Policy speak for themselves. Except as expressly admitted and alleged, Twin City denies generally and specifically each and every allegation of paragraphs 14 through 17 of the Complaint.

### STATEMENT OF CLAIM

8. Answering paragraphs 18, 21, 22, and 24 of the Complaint, Twin City admits all allegations therein.

9. Answering paragraph 19 of the Complaint, Twin City alleges that the complaint filed by Mark J.C. Yee in the lawsuit entitled, Mark J.C. Yee, Trustee for the Bankruptcy Estate of Hawaiian Grocery Stores, Ltd. v. Unified Western Grocers, Inc., et al., Civil No. 02-00668 HG BMK, speaks for itself.

Except as expressly alleged, Twin City denies generally and specifically each and every allegation set forth in paragraph 19 of the Complaint.

10. Answering paragraphs 20 and 23 of the Complaint, Twin City denies generally and specifically each and every allegation contained therein.

#### AFFIRMATIVE DEFENSES

As separate and distinct affirmative defenses to Plaintiffs' alleged claims, Twin City alleges as follows:

##### FIRST AFFIRMATIVE DEFENSE

11. As a first affirmative defense to the Complaint on file herein and each cause of action thereof, Twin City alleges that Plaintiffs' claims are barred because the Complaint, and each and every claim therein, fails to state a claim upon which relief can be granted against Twin City.

##### SECOND AFFIRMATIVE DEFENSE

12. As a second affirmative defense to the Complaint on file herein and each cause of action thereof, Twin City alleges that coverage is precluded for the claims against Plaintiffs in the lawsuits captioned, Mark J.C. Yee, Trustee for the Bankruptcy Estate of Hawaiian Grocery Stores, Ltd. v. Unified Western Grocers, Inc., et al., United States Bankruptcy Court for the District of Hawaii, Adv. No. 01-0079, Mark J.C. Yee, Trustee for the Bankruptcy Estate of Hawaiian Grocery Stores, Ltd. v. Unified Western Grocers, Inc., et al., United States District Court for the District of Hawaii, Civil No. 02-00164 HG BMK, Mark J.C. Yee, Trustee for the Bankruptcy Estate of Hawaiian Grocery Stores, Ltd. v. Unified Western Grocers, Inc., et al., United States District Court for the District of Hawaii, Case No. 02-00668 HG-BMK [Bankruptcy Case No. 99-05157], and any related lawsuits (collectively, the "Underlying Lawsuits"), by application of the terms, conditions, definitions, exclusions and endorsements set forth in the Policy.

THIRD AFFIRMATIVE DEFENSE

13. As a third affirmative defense to the Complaint on file herein and each cause of action thereof, Twin City alleges that coverage may be barred or limited, in whole or in part, for the Underlying Lawsuits because the Policy contains an exclusion which, in part, excludes coverage for any third party claim against the directors and officers of Unified Western Grocers or its subsidiaries: "for, based upon, arising from, or in any way related to such Directors and Officers serving as a director, officer, trustee, regent, governor or employee of any entity other than the Company even if such service is at the direction or request of the Company, provided that this exclusion does not apply with respect to a Claim for a Wrongful Act by a Director or Officer while serving in an Outside Position if such Claim is brought and maintained without the solicitation, assistance or participation of the entity in which the Director or Officer serves in the Outside Position or any director, officer, trustee, regent, governor or employee of such entity ..."

FOURTH AFFIRMATIVE DEFENSE

14. As a fourth affirmative defense to the Complaint on file herein and each cause of action thereof, Twin City alleges that coverage is precluded for the Underlying Lawsuits by application of public policies precluding an insurer from indemnifying loss or damages resulting from willful or intentional acts, including, but not limited to, the public policy expressed in California Insurance Code Section 533.

FIFTH AFFIRMATIVE DEFENSE

15. As a fifth affirmative defense to the Complaint on file herein and each cause of action thereof, Twin City alleges that the Complaint fails to state facts sufficient to trigger any duty on the part of Twin City with respect to the

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defense or indemnification of the Underlying Lawsuits, or to contribute to the defense or indemnification of such Underlying Lawsuits.

SIXTH AFFIRMATIVE DEFENSE

16. As a sixth affirmative defense to the Complaint on file herein and each cause of action thereof, Twin City alleges that coverage is precluded or the Underlying Lawsuits by public policies precluding an insurer from indemnifying fines, penalties, punitive damages, exemplary damages, and restitutionary or injunctive or equitable relief.

SEVENTH AFFIRMATIVE DEFENSE

17. As a seventh affirmative defense to the Complaint on file herein and each cause of action thereof, Twin City alleges that coverage may be barred or limited for the Underlying Lawsuits to the extent that such Underlying Lawsuits do not involve a suit against Plaintiffs for covered “damages.”

EIGHTH AFFIRMATIVE DEFENSE

18. As an eighth affirmative defense to the Complaint on file herein and each cause of action thereof, Twin City alleges that, to the extent that the Policy is subject to various limitations, including but not limited to, deductibles or self-insured retentions, Twin City’s liability under the Policy, if any, is restricted by and all such limitations.

NINTH AFFIRMATIVE DEFENSE

19. As a ninth affirmative defense to the Complaint on file herein and each cause of action thereof, Twin City alleges that some or all of the claims asserted in the Underlying Lawsuits may be subject to an allocation pursuant to a provision in the Policy which provides that: “(i)f both Loss covered under this Policy and loss not covered under this Policy are incurred, either because a Claim against an Insured includes both covered and uncovered matters ... the

Insureds and the Insurer shall fairly and reasonably allocate such amount between covered Loss and uncovered loss.”

TENTH AFFIRMATIVE DEFENSE

20. As a tenth affirmative defense to the Complaint on file herein and each cause of action thereof, Twin City alleges that coverage is barred for any claims asserted in the Underlying Lawsuits against any entities, individuals or parties who do not fall within the definition of “Directors and Officers” under the Policy.

ELEVENTH AFFIRMATIVE DEFENSE

21. As an eleventh affirmative defense to the Complaint on file herein and each cause of action thereof, Twin City has at all times material herein, handled the Underlying Lawsuits in a prompt, expedient and reasonable manner, and has acted in good faith in light of the circumstances of which it was aware.

TWELFTH AFFIRMATIVE DEFENSE

22. As a twelfth affirmative defense to the Complaint on file herein and each cause of action thereof, Twin City alleges that coverage under the Policy for the Underlying Lawsuits may be barred by the doctrine of laches, arising from Plaintiffs’ unreasonable delay in bringing these claims and such delay has caused prejudice to Twin City.

THIRTEENTH AFFIRMATIVE DEFENSE

23. As a thirteenth affirmative defense to the Complaint on file herein and each cause of action thereof, Twin City alleges that coverage under the Policy for the Underlying Lawsuits may be barred by the doctrine of estoppel.

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FOURTEENTH AFFIRMATIVE DEFENSE

24. As a fourteenth affirmative defense to the Complaint on file herein and each cause of action thereof, Twin City alleges that coverage under the Policy for the Underlying Lawsuits may be barred by the doctrine of waiver.

FIFTEENTH AFFIRMATIVE DEFENSE

25. As a fifteenth affirmative defense to the Complaint on file herein and each cause of action thereof, Twin City alleges that coverage under the Policy for the Underlying Lawsuits may be barred as a result of Plaintiffs' unclean hands.

SIXTEENTH AFFIRMATIVE DEFENSE

26. As a sixteenth affirmative defense to the Complaint on file herein and each cause of action thereof, Twin City alleges coverage under the Policy for the Underlying Lawsuits may be barred or limited, in whole or in part, to the extent that Plaintiffs failed to comply fully with the terms and conditions of the Policy or otherwise perform their obligations under the terms, conditions, definitions, exclusions and endorsements of the Policy.

SEVENTEENTH AFFIRMATIVE DEFENSE

27. As a seventeenth affirmative defense to the Complaint on file herein and each cause of action thereof, Twin City alleges that coverage may be barred or limited for the Underlying Lawsuits to the extent that Plaintiffs failed to mitigate, minimize or avoid the harm which is the subject of the claims submitted to Twin City by Plaintiffs in connection with the subject matter of this section.

EIGHTEENTH AFFIRMATIVE DEFENSE

28. As an eighteenth affirmative defense to the Complaint on file herein and each cause of action thereof, Twin City alleges that, in the event it is determined that no coverage exists under the Policy for some or all of the



claims asserted in the Underlying Lawsuits, Twin City is entitled to reimbursement from Plaintiffs of all sums expended by Twin City in defense and/or indemnification of Plaintiffs for such claims.

#### NINETEENTH AFFIRMATIVE DEFENSE

29. As a nineteenth affirmative defense to the Complaint on file herein and each cause of action thereof, Twin City alleges that, if other collectible insurance with any other insurer is available concerning some or all of the claims asserted in the Underlying Lawsuits, the insurance afforded by the Policy, if any, shall be in excess of any such other insurance, or may be barred or limited, in whole or in part, by the terms and conditions of the Policy.

#### TWENTIETH AFFIRMATIVE DEFENSE

30. As a twentieth affirmative defense to the Complaint on file herein and each cause of action thereof, Twin City alleges there is no dispute between the parties that is ripe for determination because coverage under the Policy has not yet been triggered.

#### TWENTY-FIRST AFFIRMATIVE DEFENSE

31. As a twenty-first affirmative defense to the Complaint on file herein and each cause of action thereof, Twin City alleges that, if it is held liable to indemnify any party herein for any part of the claims asserted against them in the underlying litigation, Twin City is entitled to full equitable contribution from Unified Western Grocers, Certified Grocers and Grocers Specialty (the "Uninsured Corporate Entities"), and each of them, so Twin City can recoup from and be reimbursed by the Uninsured Corporate Entities, and each of them, any sum which Twin City must pay to Plaintiffs.

#### TWENTY-SECOND AFFIRMATIVE DEFENSE

32. As a twenty-second affirmative defense to the Complaint on file herein and each cause of action thereof, Twin City alleges that, to the extent

that it is required to indemnify any party herein for any part of the claims asserted against them in the underlying litigation, the Uninsured Corporate Entities will receive a benefit or windfall and will be unjustly enriched at the expense of Twin City. Twin City is entitled to restitution in the amount of the benefit or windfall to the Uninsured Corporate Entities.

**PRAYER FOR RELIEF**

WHEREFORE, Twin City prays that judgment be entered as follows:

- 1) That Plaintiffs take nothing by reason of their Complaint;
- 2) That this Court enter a judgment in favor of Twin City and against Plaintiffs on the Complaint, and that the Complaint be dismissed with prejudice;
- 3) Or, in the alternative, that this Court declare that Twin City have no duty toward Plaintiffs or any other person or entity named as an insured under the Policy, to defend, pay costs or defense, indemnify, or contribute to the costs of defense or indemnification concerning the Underlying Lawsuits;
- 4) That this Court declare, to the extent that Twin City has any duty with respect to some or all of the claims asserted in the Underlying Lawsuits, that such duty is limited by and subject to all the terms, conditions, definitions, exclusions and endorsements of the Policy;
- 5) That judgment be entered in favor of Twin City, declaring that Plaintiffs are not entitled to any contribution and/or indemnification from Twin City; and

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6) That this Court award such other and further relief as this Court deem appropriate.

DATED: Honolulu, Hawai'i, \_\_\_\_\_.

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COMPANY

**CERTIFICATE OF SERVICE**

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

**SERVICE LIST**

*Unified Western Grocers, et al. v. Twin City Fire Insurance Company*  
USDC District of Hawaii Case No. CV 03 00336 HG BMK

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